# SUPREME COURT OF THE UNITED STATES.

No. 1291

FRANK ROBERTS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals,
Fifth Circuit,
and
## BRIEF AND ARGUMENT IN SUPPORT THEREOF.

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## PETITION FOR WRIT OF CERTIORARI

**to the United States Circuit Court of Appeals Fifth Circuit.**

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner, Frank Roberts, respectfully shows:

1. Your petitioner was indicted in the District Court of the United States for the Northeastern Division of the Northern District of Alabama at the October term the Year of A. D. 1937. Said indictment was in two counts:

Count 1 of said indictment charged that your petitioner did feloniously steal and unlawfully carry away from a freight house one case of Avalon cigarettes and two cases of North State Tobacco; that the same constituted an interstate shipment of freight when so stolen and carried

away. Count 2 of said indictment charged that your petitioner did have in his possession one case of Avalon Cigarettes and two cases of North State Tobacco which had been stolen from a freight depot of the Southern Railway Company, of which your petitioner knew, prior to the time that he acquired the same (Rec. 2-3).

On the 25th day of April, 1938, your petitioner was arraigned in the court aforesaid on said indictment and then and there entered a plea of guilty to said indictment, and said Court, for good cause shown, continued the sentence of your petitioner thereon until the 26th day of April, 1938 (Rec. 4-5).

On April 26, 1938, in the court rooms of the United States for said Court in Huntsville, Alabama, in open court, said Court sentenced your petitioner to two years imprisonment in an institution of the penitentiary type to be designated by the Attorney General or his authorized representative and assessed a fine of $250.00 against your petitioner, your petitioner to stand committed on the 25th day of May, 1938; said Court then and there suspended the execution of the penitentiary sentence and placed your petitioner on probation for a period of five years, **the only condition** of probation imposed by order of the Court being that your petitioner pay the fine imposed as aforesaid (Rec. 5-6). The aforesaid fine was immediately paid by your petitioner and petitioner was enlarged upon probation for a period of five years, the execution of the judgment sentencing petitioner to the penitentiary being suspended.

On June 18, 1942, complaint was filed by the United States Probation Officer setting forth no facts, but charging by way of conclusion that

> "The aforesaid affiant further states that he has information that subsequent to April 26, 1938, and before the present date, the said Frank Roberts has violated the conditions of his probation" (Rec. 73).

Warrant of arrest was issued upon the aforesaid complaint by the Honorable T. A. Murphree, United States District Judge, Northern District of Alabama on the 18th day of June, 1942, and executed by the United States Marshall by taking the said Frank Roberts into custody and incarcerating him in jail on the same day (Rec. 74-75).

On June 19, 1942, your petitioner was brought before Judge Murphree and judgment was entered revoking his probation setting aside the former sentence and resentencing petitioner to a penitentriary term of three years (Rec. 17-20).

It does not appear of record that any evidence was heard by the Judge nor does any recital in the last mentioned judgment refer to the taking of testimony.

Petitioner took an appeal from the last mentioned judgment to the Circuit Court of Appeals for the 5th Circuit, which affirmed said judgment and petitioner then filed his petition for a writ of certiorari to the Supreme Court of the United States and the Supreme Court of the United States did on the 22nd day of November, 1943, render a judgment reversing the last mentioned judgment of the said District Court.

The defendant then appeared in the United States District Court aforesaid on the 7th day of June, 1944, and did then and there move the court for a new hearing on the aforesaid complaint of the Probation Officer and did make a motion to strike separately and severally the Judge's warrant of arrest issued June 18, 1942, and the complaint of the Probation Officer upon which said warrant of arrest was issued, and did move the court for an order requiring the Government by proper proof, or legal proof, to show or present evidence tending to show, and from which said court could make a finding of fact that petitioner had violated a lawful term or condition of the order granting him probation and did move the court for permission to present evidence in his defense tending

to show that he had conducted himself in such manner and had such character during the entire five year period of his probation, as that the court, upon hearing that testimony, would determine that petitioner was not subject to have his probation revoked (Rec. 25-30).

All of the aforesaid motions were separately and severally made, overruled, and exceptions duly taken. The defendant also entered objection to the imposition of sentence assigning as grounds each objection and each and every motion aforesaid and each and every ground for each of said motions aforesaid (Rec. 64), and upon the further grounds that the record of the cause was insufficient to give the court jurisdiction to impose a sentence and upon the further ground that the period of probation had expired and the court had lost jurisdiction (Rec. 66; Rec. 27). Judgment was thereupon entered reciting as a fact

> "Frank Roberts, having been found guilty of said offenses, and his probation revoked, and showing no good or legal cause why his original sentence of two years should not now be placed in full force and effect, the court now places the same into effect, and defendant is hereby sentenced to two years and committed to the custody of the Attorney General of the United States or his authorized representative for the period of two years, or until said defendant is otherwise discharged as provided by law, said sentence hereby imposed to become effective immediately" (Rec. 27-30).

Notice of appeal from said judgment was duly given (Rec. p. 78) and grounds of appeal filed (Rec. pp. 79-81), bail bond on appeal duly filed (Rec. pp. 81-83). Assignment of errors Nos. 1 to 11 were duly filed (Rec. pp. 84-86).

Thereafter, said cause was submitted and decision in the Circuit Court of Appeals for the Fifth Circuit on the 26th day of February, 1945 (Rec. p. 88), and on March 29, 1945,

decision was rendered by the Circuit Court of Appeals affirming the judgment of the court below (Rec. pp. 89-92) and judgment thereupon rendered (Rec. p. 92).

On April 10, 1945, within the time allowed by law and the rules of court, petitioner filed his application for rehearing in the Circuit Court of Appeals for the Fifth Circuit (Rec. pp. 93-95), assigning several separate and several reasons, which said application for rehearing was denied on April 18, 1945 (Rec. p. 96).

## JURISDICTION.

It is contended that the United States Supreme Court has jurisdiction to review the judgment of the Circuit Court of Appeals here sought to be reviewed under Section 347 (a) of Title 28 of the United States Code.

## QUESTIONS PRESENTED.

1. Is a defendant in a criminal case entitled to have a new hearing where, upon appeal from a former judgment, the judgment is reversed and remanded?

2. Does a District Court have jurisdiction to revoke an order of probation without evidence legally taken in open court sufficient to show to the satisfaction of a court that said petitioner has violated one of the conditions of probation prescribed in the order of probation upon which he was released or in some subsequent modification of said order of probation of which he was legally informed and instructed?

3. When a judgment has been vacated on appeal to a higher court by a judgment of reversal entered by said higher court, does a court below have jurisdiction to base a sentence upon such judgment so vacated by such reversal?

4. Can a person, admitted to probation, have his probation revoked without evidence of facts appearing on the face of the record tending to establish a violation of some order or conditon of his probation of which he was duly and legally informed and which was judicially prescribed by order of the court?

## REASONS RELIED ON FOR GRANTING THE WRIT.

1. There is here involved important and fundamental questions of law which have never been directly passed upon by the Supreme Court of the United States and should be settled by it.

2. The decision here sought to be reviewed is in conflict with the judgment of the Supreme Court of the United States on a prior appeal.

3. The judgment of the Circuit Court of Appeals here sought to be reviewed is in conflict with prior judgments of the Supreme Court of the United States in the case of Escoe v. Yerbst, 295 U. S. 490.

4. The decision of the Circuit Court of Appeals here sought to be reviewed is in conflict with the applicable decisions of the Supreme Court of the United States wherein it is held that an order of probation may not be revoked without a fair hearing, and especially the judgment and decision in the case of Escoe v. Yerbst, 295 U. S. 490.

5. The decision of the Circuit Court of Appeals here sought to be reviewed is contrary to the decision of the Circuit Court of Appeals of other circuits and particularly the decision in the case of Hollandsworth v. U. S., 34 Fed. (2nd) 423.

And your petitioner herewith presents as a part of this petition, transcript of the record in the Circuit Court of Appeals for the Fifth Circuit. And your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding that court to certify and send to this court for its review and determination on a day certain to be therein named the full and complete transcript of the record and all proceedings in the cause numbered and entitled on its Docket No. 11,073, Frank Roberts, appellant, v. United States of America, appellee, and that said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this court, and that your petitioner be discharged without day and have such other and further relief in the premises as this Honorable Court may deem just and proper.

.....

G. ERNEST JONES,
Of Birmingham, Alabama,
Counsel for Petitioner.

RODERICK BEDDOW,
Birmingham, Alabama,
Of Counsel for Petitioner.

I, G. Ernest Jones, counsel of record for the petitioner in the above styled petition, do hereby certify that the above and foregoing petition for writ of certiorari is filed in good faith believing the same to be meritorious.

.....

G. Ernest Jones,
Counsel for Petitioner.

# PETITIONER'S BRIEF

# SUPREME COURT OF THE UNITED STATES.

No. .....

FRANK ROBERTS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

## BRIEF AND ARGUMENT

**In Support of Petition for Writ of Certiorari.**

May it please the court, the judgment of the Circuit Court of Appeals for the Fifth Circuit here sought to be reviewed was entered by the Circuit Court of Appeals on March 29, 1945.

Application for rehearing was duly and timely filed and was denied by the Circuit Court of Appeals for the Fifth Circuit April 18, 1945. The facts have been fully set forth in the attached petition for writ of certiorari, pages 1 to 4, inclusive. The opinion of the Circuit Court of Appeals for the Fifth Circuit here sought to be reviewed is found at pages 89-91 of the transcript of the record filed herewith.

## JURISDICTION.

The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended, the same being 28 U. S. C. A. 347 (a).

## SPECIFICATION OF ERRORS ASSIGNED.

1. The Circuit Court of Appeals for the Fifth Circuit erred in holding that a sentence could be imposed upon a defendant charged with violating his probation, predicated upon a judgment which had been reversed, without a hearing to support a new judgment upon which to predicate the sentence.

2. The Circuit Court of Appeals erred in holding that there had been a judicial hearing and finding of fact in the Federal District Court to support the judgment originally entered revoking probation, and an adjudication that defendant had entered a plea of guilty and paid a fine for having in his possession in dry territory and in his place of business many cases of prohibitive malt liquors.

3. The Circuit Court of Appeals erred in holding that the appeal to the Circuit Court of Appeals presented only one question, viz.: The contention of defendant that he should have been granted a hearing de novo as to his good behavior.

4. The Circuit Court of Appeals erred in ignoring and failing to decide important questions of law presented on the appeal by assignment of error and brief and argument duly presented.

5. The Court of Appeals erred in holding as a fact that "on June 19, 1942, and after a hearing, it was ascertained by the court that defendant had violated the conditions of his probation. Eleven cases of beer were found in the back of his store where men congregated to drink."

6. The Circuit Court of Appeals erred in holding as follows:

> "It is without dispute that a full and fair hearing was held at the time the defendant was given the sentence of three years."

7. The Circuit Court of Appeals erred in holding as follows:

> "It was not incumbent upon the court to again grant a hearing, and go into the question of the good conduct of the defendant."

## ARGUMENT.

It is respectfully submitted that when the Supreme Court of the United States on November 22, 1943, entered a judgment reversing the judgment of the United States District Court which was there reviewed upon writ of certiorari, being the judgment entered by Judge Murphree in the United States District Court for the Northern District of Alabama on June 19, 1942, the last mentioned judgment of the District Court was vacated and had no further force and effect to support any writ or any action or any sentence.

> "To reverse is to vacate, or set aside, but it does not include any other affirmative action unless specifically directed by the appellate court." 3 Amer. Juris., p. 699, Sec. 1184.

It must be observed that the judgment of the Supreme Court of the United States did not reverse the judgment and review and remand the cause with directions.

It must be observed, also, that the judgment of the Supreme Court of the United States did not reverse in part and affirm in part and remand for sentence.

In fact, the reversal was a clear, straight, unqualified reversal without any limitation upon its effect. It is the contention of the petitioner that this judgment of reversal had the legal effect of vacating, setting aside, and holding for naught the entire judgment which was reversed.

A judgment which has been reversed cannot furnish the base to support a sentence.

In order that the court below might render a new judgment to support a sentence it would be necessary to have a new hearing. The Supreme Court of the United States at the time it reversed the first judgment could not judicially know that the same judge would be presiding in the

court below when the matter came back to that court for further proceedings.

Evidence taken orally by the court below, if any evidence was taken, could not be carried in the breast of the court throughout the period intervening between the rendition of that judgment and the time when the cause came on for further proceedings after that judgment was reversed. There is no record of any evidence on file nor is there any record of any hearing upon which the former judgment was predicated to support a new judgment after reversal, so far as appears from the record of the court below.

Judgment of the District Court having been reversed by the United States Supreme Court was without any validity, force or effect.—Butler v. Eaton, 141 U. S. 240, 11 S. Ct. 985, 7, 35 L. Ed. 713; Keller v. Hall, 111 Fed. (2) 129.

An opinion of an appellate court concluding with the sentence, "the judgment of the court below is reversed," means a new trial is required in the court below.—Fed. Reserve Bank, etc., v. Ocean City, 95 Fed. (2) 519; Cosak v. U. S., 54 Fed. (2) 72.

In general, on reversal of a judgment without more, a new trial follows.—Hughes Fed. Practice, Sec. 5633.

An unqualified reversal necessitates a new trial.—Wallace v. Seagraves, 51 Fed. (2) 143, 144; Northern Pacific Rwy. Co. v. Van Dusen Harrington Company, 34 Fed. (2) 786; Shell Petroleum Corp. v. Shore, 80 Fed. (2) 785; Cyclopedia of Federal Procedure, 2 Ed., Vol. 12, Sec. 641; 3 Amer. Juris., p. 736, Sec. 1240.

The first assignment of error presented to the Circuit Court of Appeals was based upon the principle of law hereinbefore set forth.

When this defendant was called into court on the 7th day of June, 1944 (his first appearance in court after the reversal of the formed judgment of June 19, 1942), he demanded a hearing upon the complaint filed in court on the

18th day of June, 1942 (Rec. p. 32). This hearing was denied (Rec. p. 32, Rec. p. 26). The judgment from which this appeal was prosecuted to the Circuit Court of Appeals and to review which this petition of writ of certiorari is filed appears in the record at pages 27-30 and clearly shows that the sentence imposed is predicated upon the former judgment which had been reversed (Rec. p. 29), and that no new judgment entered on June 17, 1944, adjudicating that the defendant had violated the terms and conditions of his probation, and no new judgment was entered revoking the order of probation (Rec. p. 29).

It is respectfully submitted that if the Supreme Court of the United States had intended to reverse this cause with directions to correct the sentence, it would have been easy enough for the court so to do. The Supreme Court of the United States carefully avoided the adjudication of any question which might arise in the proceedings after reversal or which might be presented by this petitioner after reversal by limiting its holding so that no question would be foreclosed on further proceedings except the one question decided by the following language contained in the opinion of the court:

> "All we now hold is that, having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment."—Roberts v. U. S. A.; opinion delivered Nov. 22, 1943.

The mandate which came down from the Supreme Court to the District Court commanded

> "that such further proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had."—Rec. p. 77.

When this judgment was rendered and this mandate sent down, the Supreme Court of the United States could not judicially know that the judge who entered the former judgment would be presiding over the District Court at the time the further proceedings were to be had. The former judgment having been reversed, vacated, set aside, and held for naught, the judge who might be sitting in the District Court when the cause came back for further proceedings could not enter a judgment revoking the probation without having evidence before him upon which to base such a judgment. The fact that the same judge might be sitting in 1944 who sat in 1942 would not have the effect of permitting the court to carry in its breast the oral proceedings had before him on June 19, 1942.

The new judgment would of necessity be predicated upon the new proceedings unless the Supreme Court of the United States had directed upon the record the new judgment to be entered by the court below. This was not done.

The right of a party to have a new trial where a case was tried without a jury, judgment rendered, which judgment was reversed by the Circuit Court of Appeals was particularly upheld in the case of Wallace v. Seagraves, supra, in an opinion rendered by Judge Hutcheson, a member of the Circuit Court of Appeals who was then presiding over the District Court for the Southern District of Texas on June 10, 1931. We direct attention to this case for the particular reason that Judge Hutcheson so clearly and forcibly states the reason why a new trial should be granted in such a case.

We quote:

> "Plaintiff supports his motion with the citation of many authorities as to the power of the Circuit Court of Appeals and of this court in a case of this kind. These authorities I think make it clear that the relief which he asked for may not be given. They are all to

the effect that where a case is tried to the court without a jury and has gone to judgment after full consideration on their merits of the issues which are legitimately in it, the Circuit Court of Appeals may either itself enter judgment as in the Bank of Waterproof v. Fidelity & Deposit Company, 299 Fed. 478; U. S. v. Ill. Surety Company, 266 Fed. 653; or send a case back to the District Court with directions to enter such judgment, as in U. S. v. Stark (CCA), 32 Fed. (2) 453; Routzahn v. Mason (CCA), 13 Fed. (2) 702. Here neither of these things was done, but, on the contrary, by refusing to render and by reversing and remanding the cause the Court of Appeals has in fact and in law directed that the case be tried anew on the cause of action as to the bonds.

"(2) If, however, I am incorrect in this and the order on that court may be construed as directing neither a retrial nor entry of judgment, by reversing the case leaving to this court the decision of what action may be right and proper under the circumstances, I think it perfectly plain that if this court now to undertake to enter judgment for plaintiff upon its large and constantly growing claims, not upon a hearing of the cause, but upon a basis of the account filed with this motion, would be to substitute trial by accountant for the ordinary trial in a court of law, and to deprive defendant of that which is guaranteed to him, his day in court, upon whatever issues of law and fact remain undecided. If plaintiff is correct in his position that the Circuit Court of Appeals has decided in his favor every matter both of law and of fact which might be asserted by the defendant in the course of a retrial, he cannot be in any wise injured or prejudiced by such trial, but will, at the end of it, obtain that which that court has given him warrant to obtain. * * *

"By a retrial no single right that he has can be lost to plaintiff. No single advantage that he has not can be gained by defendant." Wallace v. Seagraves, supra.

Paraphrasing the above language of Judge Hutcheson in the case of Wallace v. Seagraves, supra, we suggest that if the Supreme Court of the United States had considered that the state of the record then before it was such that no new trial would be proper, the Supreme Court of the United States could, and would, have reversed the cause in part and remanded it with direction to impose a proper sentence in accordance with law.

If we are correct in this position, the District Court disobeyed the mandate of the Supreme Court of the United States remanding this cause for **such further proceedings as according to right and justice of the laws of the United States ought to be had** (Rec. p. 77), and the opinion of the Circuit Court of Appeals here sought to be reviewed is not in accord with the judgment of reversal heretofore rendered. That we are correct in our contention that many questions apparent on the face of the record were left undecided by the Supreme Court of the United States is the only inference to be drawn from the fact that the court limited the effect of its decision to the one proposition embraced in the excerpt from the decision reading as follows:

> "All we now owe is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." Roberts v. U. S. A. Opinion delivered Nov. 22, 1943.

So we respectfully submit that the first question presented in our writ of certiorari should be answered in the affirmative.

## II.

The second question presented by our petition for a writ of certiorari goes to the jurisdiction of a District Court to revoke an order of probation without it appear-

ing of record that evidence was legally taken, and upon such evidence the court adjudicated the fact to be that the alleged violator had violated a particular condition of probation prescribed in the order of probation upon which he was released or in some subsequent modification of said order of probation of which he was legally informed and instructed.

That a United States District Court is a court of limited jurisdiction cannot be questioned. It follows that the facts on which he jurisdiction of a district court rests must, in some form, appear in the record of all suits prosecuted in a federal district court and to this rule there are no exceptions. It is essential that this jurisdiction affirmatively appear by facts recited in the record and it is not sufficient that jurisdiction may be inferred argumentatively from averments in the pleadings. To sustain jurisdiction of the averments must be positive or the case may be dismissed at any stage of the proceedings. U. S. C. A., Title 28, Section 1; U. S. C. A., Title 28, Section 41; authorities annotated in Footnote 61 and Footnote 62 to Section 41 (1), Title 28, U. S. C. A.

(a) **It does not appear that any lawful order or condition of probation was imposed of which this petitioner was instructed other than that this petitioner pay a fine of $250.00.**

We direct the court's attention to the fact that the judgment admitting this petitioner to probation rendered by Judge Kennamer on April 26, 1938, imposed no condition except the condition that the defendant pay the fine imposed (Rec. pp. 6-7). It appears from this judgment that the defendant was in open court and heard the sentence imposed, and heard the order placing him on probation, and heard the conditions which were imposed upon him in that judgment, since the recital of the judgment shows that the defendant was called upon to state rea-

sons if any why judgment should not be pronounced against him (Rec. p. 6).

The only order referring to general conditions of probation appears in the orders of the court at a session held Thursday, September 21, 1939, at which session the court spread upon the minutes of the court an order imposing general conditions of probation (Rec. pp. 10-11).

There is nothing in the record which would support any inference that this petitioner was ever informed or instructed that the orders imposing general conditions of probation of September 21, 1939, were imposed upon him, or that he was subject to the same.

The complaint filed by the probation officer on June 18, 1942, fails to contain any factual charge that the petitioner had committed any act of any kind. The affiant (Monte C. Sandlin) contented himself by swearing:

> "That he has information that subsequent to April 26, 1938, and before the present date, the said Frank Roberts has violated the conditions of his probation" (Rec. p. 73).

There is no legal evidence in this record tending to show that the defendant committed any act of any kind. The judgment reviewed and reversed on the former petition for writ of certiorari contained no recital that any hearing of any kind had been conducted and contained no recital that any evidence had been submitted to the court to prove that this petitioner had committed any act of any kind, and from its recitals appears to have been rendered upon the theory that the burden of proof was upon the defendant to exculpate himself from the charge that he had violated the terms of his probation by producing affirmative evidence showing cause why his probation should not be revoked (Rec. pp. 18-20).

The Court does recite "that no sufficient cause to the contrary being shown or appearing to the court, and it

appearing to the court that the defendant has violated the terms of his said probation" (Judgment Recital, Record p. 19).

For aught that we find in the record, the only way that it was made to appear to the court that the defendant had violated the terms of his probation was by way of general conclusion in the affidavit of Monte Sandlin based on hearsay (Rec. p. 73) and by virtue of the further fact that the defendant (petitioner here) did not accept and carry the burden of proof to exculpate himself by showing "sufficient cause to the contrary" (Rec. p. 19).

The case of Hollandsworth v. U. S., 34 Fed. (2) 423, is clear in its holding that a probationer is subject only to the terms and conditions of probation set out in the order admitting him to probation and of such he was instructed and informed.

> "We think it is a necessary implication from the terms of the statute that this power may not be exercised arbitrarily and without reference to the behavior of the defendant during the period of probation. Section 1 of the Act expressly discusses the charge, when exercising the power to suspend sentence and place the defendant upon probation, to fix such terms and conditions as he may deem best. It is thus manifestly the duty of the Judge at the outset to inform the defendant as to the condition of his probation and instruct him as to the line of conduct he should pursue." Hollandsworth v. U. S., 34 Fed. (2) 423, at page 427.

The case of Hollandsworth v. U. S., supra, is also direct and positive authority that there must be a judicial determination that the probationer's conduct during the probation period has not conformed to the course outlined in the order of probation before probation may be legally revoked.

> "In view of these several provisions of the Act, it seem to be clear that, if the probationer com-

plies with the condition of his probation, he is entitled to remain on probation, is subject to the supervision of the court and its officers, until the maximum period of sentence expires, and is then entitled to a final discharge. The power of the court to revoke a probation and sentence the probationer may not be exercised unless it is made to appear that he has failed to comply with the terms and conditions prescribed for him. It is not conceivable that Congress intended to confer upon the court the power to call back the defendant at any time within five years after conviction and imprison him, no matter how blameless his conduct may have been during the interim or how strictly he may have observed the terms of his probation. It follows that, whenever it is charged that a probationer has failed to follow the instructions of the court, he may not be sentenced until he has been given notice of the specific charge and an opportunity to be heard in his defense, and until the court, upon hearing, shall have judicially determined that his conduct during the probation period has not conformed to the course outlined in the order of probation." Hollandsworth v. U. S., supra.

The United States Supreme Court, in the case of Escoe v. Zerbst, 295 U. S. 490, 79 Law. Ed. 1566, is positive and definite in its holding that a probationer may not have his probation revoked without a judicial hearing and an adjudication that he has been guilty of some act or some conduct which is in violation of the terms and conditions of his probation and if a defendant be not given such a hearing, a judgment vacating the probation order and ordering the execution of the sentence is held to be void and the defendant was ordered to be discharged in the case of Escoe v. Zerbst, supra.

"When a hearing is allowed but there is error in conducting it or in limiting its scope, the remedy is by appeal. When an opportunity to be heard is de-

nied altogether, the ensuing mandate of the court is void, and the prisoner confined thereunder may have recourse to habeas corpus to put an end to the restraint." Escoe v. Zerbst, supra.

The opinion in the case of Escoe v. Zerbst, supra, is a very well reasoned and able discussion and we urge the court to read and consider that entire opinion in connection with this petition.

III.

It is respectfully submitted that the judgment of June 19, 1942, revoking the probation of this petitioner (Rec. pp. 17-20) was reversed, vacated, set aside, and held for naught by the judgment of the Supreme Court of the United States on petition for a writ of certiorari. It is, therefore, earnestly urged that there was no judgment revoking probation of this petitioner at the time this petitioner was called before the United States District Judge on June 7, 1944 (Rec. pp. 25-30). The judicial order spread on the minutes on the 7th day of June, 1944 (Rec. pp. 27-30) contains no adjudication that this petitioner had violated any order of probation, contains no judgment revoking or setting aside the order of probation contained in the judgment of April 26, 1938 (Rec. pp. 6-7) and is no more than a pronouncement of sentence predicated upon the judgment of June 19, 1942 (Rec. pp. 18-20), which had been reversed by judgment of the Supreme Court of the United States. It should be noted that the judgment of the District Court now sought to be reviewed does not adjudicate that Frank Roberts is guilty of conduct which violated the terms and conditions of his probation but refers specifically to a **past finding**, and does not revoke his probation, but refers specifically to a **past revocation**, language of the judgment and order being: "Ordered and adjudicated that the defendant, Frank Roberts, having been found guilty of said offense, and his probation revoked,." etc. (Rec. pp. 29-30).

The sentence of this defendant in the judicial order here reviewed is predicated upon the judgment revoking probation entered on June 19, 1942, which by direct judgment of the Supreme Court of the United States had been vacated, set aside, or annulled, by an unqualified reversal.

We respectfully submit that a judgment so reversed cannot support a sentence to the penitentiary and that the third question presented must be answered in the affirmative.

IV.

The fourth question presented by our petition for writ of certiorari goes to the heart of the judicial proceeding. We have attempted to demonstrate that a District Court of the United States is a court of limited jurisdiction and that the record must affirmatively show all facts necessary to support its judgment. There is nothing in this record to indicate that any evidence was taken and the court cannot make a judicial finding without having evidence of some kind. A judicial finding cannot be based upon hearsay or rumor. The great danger of orders of probation being vacated upon hearsay and rumor is pointed out in each of the cases Hollandsworth v. United States, supra, and Escoe v. Zerbst, supra. The affidavit in complaint filed against this petitioner recited no facts. It recited only by way of conclusion that the affiant (Monte C. Sandlin) had "information" that this petitioner had violated the terms of his probation. This is no more than an affidavit that there were rumors that the petitioner was doing something which somebody thought constituted a violation of some term or condition of probation. It presented no fact and could not be considered as any evidence that this defendant had committed any specific act or been guilty of any specific course of conduct.

We respectfully submit that without such evidence appearing in the record, or at least a judicial recital in the

order revoking probation to the effect that the court has judicially found upon evidence legally taken that the petitioner had committed some specific act violating some specific term or condition of his probation, of which the probationer had been duly and legally informed, the entry of such an order revoking probation is void and if not void is at least infected with such error that it cannot be upheld on appeal.

V.

The Circuit Court of Appeals attempts to uphold the judgment of the court below upon the theory that there was some evidence that this defendant had been guilty of violating the prohibition laws of Alabama. The entire record of the court down to and including the call of this defendant on the 7th day of June, 1944, appears in pages 1 to 31 of the record. There is nothing in the record to indicate, or to support an inference, that any evidence was taken at the time the judgment of June 19, 1942, was entered. The first thing this defendant did through his counsel on appearing before the judge on the 7th day of June, 1944, was to demand the privilege of a hearing upon the complaint (Rec. p. 32). The proceedings from that point on consisted of an unremitting and vigorous effort to get the court to consider motions questioning the insufficiency of the complaint, questioning the insufficiency of the warrant of arrest, questioning the existence of any valid order of probation of which this petitioner had been informed and instructed, and demanding the right to produce evidence tending to show that this defendant had conducted himself as a high-class type of citizen; that he had not violated any lawful term or condition imposed on him; that he had not violated any term or condition appearing in any order of the court; that he had conducted himself in such manner and as such character during the entire five-year period of his probation and up to the 7th

day of June, 1944, that the court would determine that he was not subject to have his probation revoked. The court overruled this motion to hear testimony (Rec. p. 51).

Up to that point, so far as appears in the record, no testimony had ever been heard by the court to prove any fact with regard to the conduct of the defendant (Rec. p. 51).

The Judge presiding over the District Court having announced his intention then and there to sentence this defendant upon the judgment rendered by the District Court on June 19, 1942 (Rec. p. 51), the court called the defendant. At that point the District Attorney made a request to get something in the record and began discussing the law of the case with a special reference to the mandate of the United States Supreme Court (Rec. pp. 51-54). Then the defendant himself was called and the court stated:

> "Mr. Roberts, have you anything to say why I should not impose sentence at this time, in addition to what is said by your attorneys already?" (Rec. p. 52).

In response to this inquiry by the Court propounded to the defendant **after judgment entered**, there was some colloquy between attorney for the defendant and the Judge of the Court, and there were assertions made by the Court as to what happened at the time the case was called on June 19, 1942. It must be borne in mind that at that point the judgment upon which the sentence to be imposed was to be predicated had long ago been entered and reversed on appeal. It is an astounding situation when a defendant has been denied throughout a proceeding, as this defendant was denied on June 7, 1944, the privilege and opportunity of presenting testimony by sworn witnesses, and then after he is called for sentence, and the court and his attorney engage in a colloquy, that

the statements made during that colloquy may be considered as evidence to support the judgment which had already been entered without evidence. Yet, this is exactly what the Circuit Court of Appeals at New Orleans has done in the opinion here sought to be reviewed, which even finds as a fact that the judgment which had already been entered could be supported by a statement made by the prosecuting attorney in opposition to the plea for clemency by counsel for the defendant when called upon to state what reason, if any, he had why sentence should not be imposed.

## CONCLUSION.

This petitioner earnestly insists that to permit the judgment sentence here sought to be reviewed to stand is to subject him to grave injustice.

He has never had a trial on the charge of violation of the terms and conditions of his probation, nor did he plead guilty to such a charge (Rec. p. 55). He was arrested and put in jail at night on the 18th of June, 1942, and haled before the Judge the next morning at nine o'clock. He was arrested at his home in Decatur, Alabama, jailed at Huntsville, Alabama, and had no opportunity to obtain witnesses and prepare his defense. At that time there was a prevailing impression among laymen, a large section of the bar, that a probationer had no right to a hearing on such charges. This opinion was entertained by many District Judges, and seems to have been the opinion of the District Judge below, who remarked that

> "Many District Judges don't even give them a hearing on probation" (Rec. p. 47).

The attitude of the District Judge below indicated a reluctance to permitting a probationer such a hearing as

would enable him to get his defenses into the Record. He remarked:

> "You want to get enough up there for them to do something, don't you" (Rec. p. 45).

Under these circumstances, considering the quoted expressions of the Judge, and his other comments throughout the proceedings, and considering the significant omission from all judgments of any recital that it was judicially determined that petitioner had done, or omitted to do any specific thing, or reciting any specific term or condition of any probation order violated, we are confident that no Court can indulge an inference that this petitioner has at any time had such a hearing as will satisfy the law, or common sense of justice.

And why should the Government so strenuously object to producing evidence to sustain its complaint based upon rumor and hearsay? The intent and purpose of the probation law is humane and merciful. It is not a snare to trap the unwary. It is a prop and a support to sustain the weak, and aid them to grow strong again. The Government does not gauge its success in administering justice by the number of victims it can entrap into its penitentiaries, but rather upon the number that may be safely left to liberty. The Government could not be hurt by requiring proof to support the complaint. Nor would the interest of Society be injured if this petitioner had been allowed, and was able to bring evidence explaining an alleged violation, or disproving the charge, and at the same time bringing witnesses in great number to establish beyond question that he was a good, law-abiding citizen of good character.

The hearing sought could not have hurt the Government. It could have greatly benefited the Petitioner.

We submit the cause in supreme faith and confidence that the Supreme Court of the United States will never permit this petitioner, or any other, to be condemned to involuntary servitude in the penitentiary for two years, without first requiring the Government to submit testimony and hearing this Petitioner's witnesses in reply.

Respectfully submitted,

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# INDEX



## CITATIONS





649010—45

# In the Supreme Court of the United States

OCTOBER TERM, 1944

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No. 1291

FRANK ROBERTS, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the circuit court of appeals (R. 88–90) is reported at 148 F. 2d 140.

### JURISDICTION

The judgment of the circuit court of appeals was entered March 29, 1945 (R. 90), and a petition for rehearing was denied April 18, 1945 (R. 94). The petition for a writ of certiorari was filed May 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

## QUESTION PRESENTED

The principal question presented is whether under the mandate of this Court in *Roberts* v. *United States*, 320 U. S. 264 (in which the Court held that the district court was without power, when it revoked petitioner's probation, to increase the two-year suspended sentence originally imposed upon him), the district court was required only to set aside the increased sentence and order execution of the original sentence or was required, in addition, to conduct a *de novo* inquiry to determine whether petitioner's probation should be revoked.

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of Sections 1 and 2 of the Probation Act (Act of March 4, 1925, c. 521, 43 Stat. 1259, *et seq.*, as amended by the Act of June 16, 1933, c. 97, 48 Stat. 256, 18 U. S. C. 724, 725) are:

> SEC. 1. The courts of the United States having original jurisdiction of criminal actions, except in the District of Columbia,[1] when it shall appear to the satisfaction of the court that the ends of justice and the best interests of the public, as well as the defendant, will be subserved thereby, shall have power, after conviction or after a plea of guilty or nolo contendere for any crime or offense not punishable by death or life

[1] The District of Columbia had its own probation statute (see D. C. Code, Title 24, Secs. 101–105).

imprisonment, to suspend the imposition or execution of sentence and to place the defendant upon probation for such period and upon such terms and conditions as they may deem best; or the court may impose a fine and may also place the defendant upon probation in the manner aforesaid. The court may revoke or modify any condition of probation, or may change the period of probation: *Provided*, That the period of probation, together with any extension thereof, shall not exceed five years.

While on probation the defendant may be required to pay in one or several sums a fine imposed at the time of being placed on probation and may also be required to make restitution or reparation to the aggrieved party or parties for actual damages or loss caused by the offense for which conviction was had, and may also be required to provide for the support of any person or persons for whose support he is legally responsible.

SEC. 2. When directed by the court, the probation officer shall report to the court, with a statement of the conduct of the probationer while on probation. The court may thereupon discharge the probationer from further supervision and may terminate the proceedings against him, or may extend the probation, as shall seem advisable.

At any time within the probation period the probation officer may arrest the probationer wherever found, without a war-

> rant, or the court which has granted the probation may issue a warrant for his arrest * * *. Thereupon such probationer shall forthwith be taken before the court. At any time after the probation period, but within the maximum period for which the defendant might originally have been sentenced, the court may issue a warrant and cause the defendant to be arrested and brought before the court. Thereupon the court may revoke the probation or the suspension of sentence, and may impose any sentence which might originally have been imposed.

**STATEMENT**

This proceeding is a sequel to *Roberts* v. *United States,* 320 U. S. 264. The litigation commenced in 1938 when petitioner pleaded guilty to an indictment charging a violation of 18 U. S. C. 409 and was sentenced to imprisonment for two years and to pay a fine of $250. The court, however, suspended execution of the sentence conditioned upon payment of the fine and ordered petitioner's release on probation for a five-year period. In June 1942, within the probation period, petitioner was brought before the court and charged with violating the conditions of his probation. Finding that he had in fact violated his probation, the court entered a judgment revoking it, setting aside the two-year sentence, and sentencing petitioner to imprisonment for three years. (320 U. S. at p. 265; R. 5–7, 10–11, 18–20.) Upon appeal to the Circuit Court of Appeals for the Fifth Circuit,

that judgment was affirmed, but this Court thereafter reversed, holding that a court may not upon revocation of probation set aside a sentence previously imposed and increase the term of imprisonment. The mandate of this Court directed that the case be remanded to the district court "for further proceedings in conformity with the opinion of this Court" (R. 75–77). In the district court, on remand of the case, petitioner contended that the mandate required that court to conduct a new hearing to determine whether probation should be revoked (see R. 32–33). The district court, however, did not so construe the mandate. Instead, on the basis of the original order revoking probation, it entered an order setting aside the three-year sentence imposed on June 16, 1942, and ordered petitioner committed "for two years under the former sentence." (R. 67, 25–30.) Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, this order of the district court was affirmed (R. 90).

**ARGUMENT**

1. We find no basis in this Court's decision or in its mandate for petitioner's contention (Pet. 12–17, 22–23) that the district court was required upon the remand of the case to conduct a *de novo* hearing to determine whether petitioner's probation should be revoked. Rather, we think it plain that the only function open to the district court upon receipt of the mandate was to vacate the order imposing the increased sentence and to

enter an order committing petitioner to imprisonment for a term not in excess of the sentence originally imposed. This is made manifest when it is recalled that when this case was first in the circuit court of appeals and in this Court the sole contention advanced by petitioner was that the three-year sentence was excessive; the propriety of the district court's finding that petitioner had violated the conditions of his probation was not challenged in any respect. This Court expressly stated in its opinion that "All we now hold is that having exercised its discretion by sentencing an offender to a definite term of imprisonment in advance of probation, a court may not later upon revocation of probation set aside that sentence and increase the term of imprisonment." 320 U. S. at pp. 272–273. Nothing in the opinion or in the mandate casts any doubt upon the propriety of the district court's action in revoking petitioner's probation. Indeed, the decision implicitly assumed that a valid order of revocation of probation had been entered.

As the circuit court of appeals points out (R. 90), the situation presented by the case is no different from that presented upon appeal from a judgment of conviction on the ground that the sentence imposed by the district court exceeds that prescribed by statute. A reversal on such ground obviously does not mean that the defendant is entitled to a new trial on the issue of his guilt. It means only that the district court is com-

manded by the mandate of the appellate court to vacate the judgment imposing the excessive sentence and to resentence the defendant. See *Braverman* v. *United States,* 317 U. S. 49, 55; *In re Bonner,* 151 U. S. 242, 259–262; *Robinson* v. *United States,* 143 F. 2d 276, 278 (C. C. A. 10); *Phillips* v. *Biddle,* 15 F. 2d 40, modified, 18 F. 2d 582 (C. C. A. 8). Similarly, we think that in this case the district court correctly concluded that its sole function was to vacate the excessive sentence imposed upon petitioner when it revoked his probation and to sentence him to imprisonment for no more than the two-year sentence originally imposed. Since the district court ordered petitioner committed to serve that sentence, there can be no question, and petitioner raises none, as to the validity of the terms of the sentence.

2. After the remand of the cause to the district court, petitioner there contended, for the first time, that the order revoking probation was vulnerable because it was not shown by the transcript of record that the court conducted a hearing on the question whether petitioner violated the conditions of his probation. (See Pet. 19–22, 23–24.) We agree with petitioner that such a hearing was a necessary condition to the exercise of the court's discretion in revoking probation (*Escoe* v. *Zerbst,* 295 U. S. 490; *Burns* v. *United States,* 287 U. S. 216), but we think that his contention is both unseasonable and without substance. As we have stated, the sole function of the district court on

the remand of the case was to modify the sentence imposed so that it did not exceed the original sentence. The remand did not reopen the entire proceeding and permit petitioner to urge for the first time a contention which he had not urged either in the circuit court of appeals or in this Court on the earlier appeal. Accordingly, we submit that petitioner's present contention is untimely. In any event, there can be no serious question that petitioner did, in fact, have a hearing before the district court ordered his probation revoked. While it is true, as petitioner states, that the transcript of record contains no stenographic report of such a hearing, the fact that a hearing was had is shown by the colloquy between petitioner's counsel and the district judge when the matter was argued in the district court on the remand of the case (see R. 40, 42–43, 47, 54–59, 61–62). Moreover, on the basis of the record when the case was previously before this Court, the Court stated that the order revoking probation was entered after the district court had conducted a hearing (320 U. S. at p. 265).

3. Immediately after petitioner was placed on probation in 1938, he was advised by the probation officer of the conditions of his probation (see R. 41–44). Petitioner now apparently urges, again unseasonably, we believe, that despite the fact that the probation officer's statement recited that the conditions of probation were ordered by the court, the court failed to make such an order

(Pet. 18–19). Whatever the situation may have been at the time petitioner was placed on probation, it is clear that on September 21, 1939, almost three years before he violated the conditions of probation, the district court entered an order imposing general terms and conditions of probation "upon each and every person heretofore and hereafter placed upon probation" (R. 10–11). All the conditions then laid down were the same as those which had been made known to petitioner by the probation officer. In these circumstances, we think it clear that the conditions of probation imposed on petitioner were, at least, adopted by the court, even if it be assumed that they originally were not prescribed by it, and that petitioner was bound to comply with those conditions.

## CONCLUSION

The case was correctly decided below, and there is involved no conflict of decisions or question of importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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